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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

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PETER RICHARD FARLAND and MEYER BRODY,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Peter Richard Farland and Meyer Brody, respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on May 25, 1971, affirming a judgment of the United States District Court for the Southern District of New York, convicting them of violating Title 18 United States Code Sec. 1341 and sentencing them to three months' imprisonment.

## Opinion Below

The United States Court of Appeals affirmed the decision of the Court below without an opinion.

## Jurisdiction

The judgment of the aforesaid Court of Appeals sought to be reviewed herein was rendered and entered on May 25, 1971. On June 22, 1971 the time for filing this petition was extended to July 24, 1971 by order of Mr. Justice Harlan.

The jurisdiction of this Court is invoked under Title 28 United States Code Sec. 1254. The basis for Federal jurisdiction in the United States District Court was the provisions of Title 18 United States Code Sec. 1341.

## Questions Presented for Review

The case presents the following questions, each of which will be discussed under the reasons for allowance of the writ:

Whether the mere use of the mails is sufficient to confer Federal jurisdiction and warrant a conviction under Title 18 United States Code Section 1341.

## Statutes Involved

The indictment charges violations of 18 U.S. Code 1341, providing as follows:

Sec. 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give

away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Sec. 34,63 Stat. 94.

## Statement of Case

The indictment herein, 70 Cr. 322, was filed on April 28, 1970, charging Peter Richard Farland and Meyer Brody with twelve Counts of violation of Title 18 United States Code Sec. 1341, to wit: causing use of the mails in furtherance of a scheme to defraud. The trial commenced on November 9, 1970, and concluded on November 16, 1970. The jury found the defendants guilty on the ten Counts submitted to it. Two Counts, more specifically Counts Six and Nine, were dismissed at the end of the Government's case. The defendant, Peter Farland, was the owner of the Allstate Furnace Company and the defendant, Meyer Brody, was a salesman for said company. The Allstate Furnace Company was in the home heating, cleaning and repair business. In its normal course of operation, the Allstate Furnace Company would render home heating repair and cleaning services. Farland, Brody and other Allstate agents made good faith representations as to the conditions of furnaces that were to be either repaired or replaced. Upon

purchasing the furnaces from Allstate, Allstate arranged financing in most cases with Gramatan Company, Ltd., a finance firm with headquarters in Bronxville, New York. Either the defendant Farland or the defendant Brody would bring promissory notes signed by the customers and obtain payments from Gramatan on discount of these notes. Only after that transaction was complete and the defendants received their monies would the mails be utilized. There was no recourse in the agreement between the defendants herein and Gramatan Company, Ltd., nor was there a charge back arrangement. The Government made no allegations as to any use of the mails by the defendants, Gramatan Company, Ltd., in the normal operation of its business, mailed payment books to the purchasers *after* it had paid Allstate in full for the contracts in question.

Motions to dismiss were made before the Motion Term of the District Court, and also at the trial based upon a lack of Federal jurisdiction and also based upon the fact that the mailings in this case were not sufficient under the statute. The motions were denied.

## REASONS FOR ALLOWANCE OF THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND THIS COURT AS TO THE PROPER INTERPRETATION AND APPLICATION OF TITLE 18 UNITED STATES CODE SEC. 1341.

Section 1341 of Title 18 United States Code specifically provides that a person shall be guilty of mail fraud when he knowingly causes the mails to be used in a scheme to defraud.

In a conviction under this section, the Government has the burden of establishing the existence of a scheme to defraud, a use of the mails for the purpose of executing a scheme, and a culpable participation in the use of the mails by the defendants. *Bauman v. United States,* 156 F.2d 534 (5th Cir.)

The statute was not designed to reach all mail frauds, ". . only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be

dealt with by appropriate state law." *Kann v. United States,* 233 U.S. 88.

The defendants engaged in the business of selling and repairing home heating equipment. After the home heating equipment was sold to consumers, the defendants would sell the contracts to an independent finance company, Gramatan Company, Ltd. The finance contracts in question were sold without recourse or charge back arrangements. The finance company would pay the defendants in full for these contracts. Gramatan Company, Ltd. would initiate its collection procedures by mailing payment books to the consumers in question, this pattern being the only allegation by the Government that there was a use of the mails as required under Title 18 United States Code Section 1341. *Kann v. United States, supra; Parr v. United States,* 363 U.S. 370 – Both cases indicate that a broader standard is necessary.

*Badder v. United States,* 240 U.S. 391 (1915) held that where mailings are innocuous in themselves, as in this case, the mailings should come under this section only where the scheme could not be carried out without the use of the mails.

In the instant case, the alleged use of the mails by an admittedly independent third party is so remote and penumbral to the alleged scheme that said use does not suffice to constitute a violation under Section 1341.

In the case of *Pereira v. United States,* 347 U.S. 1 at 8-9, this Court held that one "causes" the mails to be used when and if he does act with knowledge that use of the mails will follow in the ordinary course of business, or where such can reasonably be foreseen in furtherance of the scheme to defraud. *Anderson v. United States,* 329 F.2d 11 (8th Cir. 1964); *Atkinson v. United States,* 344 F.2d 97 (8th Cir. 1966); *United States v. Sorce,* 308 F.2d 291 (4th Cir. 1962); *Blachly v. United States,*

380 F.2d 665 (5th Cir. 1968). See also, *United States v. Williams*, 418 F.2d 1218 reversed, ––– U.S. ––– (No. 5342-October Term 1970) 28 L.Ed. 2d 493 (1971).

The Court of Appeals for the Second Circuit has drifted far afield from the construction of Section 1341 of Title 18 United States Code, as set forth above. In its recent decisions, the Second Circuit has indicated that a simple use of the mails is sufficient to confer Federal jurisdiction. *United States v. Armantrout*, 411 F.2d 60 (2d Cir. 1969); *United States v. Sterngass, aff'd from the bench after conviction*, Dkt. No. 32652-58 (2d Cir. 4/7/69); see also, *United States v. Blasingame*, 427 F.2d 329 (2nd Cir. 1970.) In reliance upon that principle, the Second Circuit has made determinations, with regard to the above section, which are in conflict with the decisions of this Court and other circuits. *United States v. Armantrout*, 411 F.2d 60 (2d Cir. 1969); *United States v. Sterngass, aff'd from the bench*, Dkt. No. 32704 (2d Cir. 12/18/68); *United States v. Zovluck*, 274 F. Supp. 385 (S.D.N.Y. (1967), *aff'd from the bench after conviction*, Dkt. No. 32652-58 (2d Cir. 4/7/69).

The most glaring departure by the Second Circuit from the usual application of Section 1341 has been its willingness to allow the application of *United States v. Blasingame*, 427 F.2d 329, (2d Cir. 1970) to Title 18 Section 1341. Although *Blasingame* relates to Title 18 United States Code Sec. 1343, the wire fraud statute, the apparent similarity between the statutes has prompted its use with relation to the mail fraud section. *Blasingame* holds that it is not necessary that a party accused of wire fraud know or foresee the use of the telephones in the execution of the scheme to defraud.

There can be no question that the rationale of *Blasingame* has been applied to the instant case, for in his determination of the defendants' motion to dismiss the instant Indictment the

Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, in a decision dated June 29, 1970, held that:

> "It may be noted in this connection that, if in fact, the mails are used in execution of this scheme, it is not necessary that the accused know or foresee such use."
> *United States v. Blasingame, supra.*

"In reality, the Court of Appeals for the Second Circuit has attached Federal Jurisdiction based upon the test of whether or not the mails have actually been used instead of the broader standards followed by this Court; to wit: whether or not there was a culpable participation in the use of the mail by the defendants. *Kann v. United States, supra.* Justice Frankfurter, in his dissent in *Parr v. United States, supra,* at 397, labels the search for a connection between the fraud and the use of the mails "as a matter of practical good sense by which the law determines issues of causation".

The mails have become, to a great extent, an integral part of our way of life. A misapplication of Title 18 United States Code Section 1341 is potentially very dangerous in that no activity can escape the ambit of the Federal Government as long as the mails have been used.

The mailing of payment books by Gramatan Company, Ltd., had no impact upon the defendants whatsoever. The defendants had no interest in Gramatan, financial or otherwise. The defendants made their arrangements with Gramatan without a recourse or a charge back arrangement. The defendants were paid before the mailings were made. The facts of the instant case indicate that if there did in actuality exist a scheme to

defraud, that scheme terminated prior to the use of the mails, and were not essential to the forwarding or advancing of a scheme to defraud. To characterize the defendants as having used the mails in a scheme to defraud is clearly an over extension of the mail fraud statute. *Bliss v. United States,* 354 F.2d 456 (5th Cir. 1966); *Kann v. United States, supra; United States v. Kenofsky,* 243 F2d 898 (C.A.5, 1969); *United States v. McKay,* 45 F. Supp. 1001; *Dyhre v. Hudspeth,* 106 F.2d 286 (C.A. 10, 1939); *Stapp v. United States,* 210 F.2d 898 (C.A. 5, *1966).*

## Conclusion

It is manifest that the present application presents a meritorious and certainly arguable question on a subject likely to arise in other cases and of character calling for authoritative disposition. The petition is filed in good faith and not for purposes of delay. Certainly, this petition has indicated that United States Court of Appeals for the Second Circuit has rendered decisions in conflict with the decisions of other Courts of Appeals and of this most Honorable Court with reference to the mail fraud statute.

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y.
July 22. 1971

Respectfully submitted,

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## OPINION OF UNITED STATES COURT OF APPEALS

### UNITED STATES COURT OF APPEALS
### FOR THE
### SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of May one thousand nine hundred and seventy-one.

Present: HON. IRVING R. KAUFMAN,

HON. ROBERT P. ANDERSON,
Circuit Judges

HON WALTER R. MANSFIELD,
District Judge

United States of America,

Plaintiff-Appellee,

v.

Peter Richard Farland and Meyer Brady

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
CLERK